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No. 84-1454

In The

Supreme Court of the United States

October Term, 1985

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MISSISSIPPI POWER & LIGHT COMPANY

Appellant,

v.

LOUIS A. CONERLY, ET ALS

Appellees

—0—

On Appeal from the Supreme Court of Mississippi

—0—

APPELLEES', LOUIS A. CONERLY, ET ALS', MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE SUPREME COURT OF MISSISSIPPI

—0—

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Attorneys for Appellees

April 28, 1985

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81 pp

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE SUPREME COURT OF MISSISSIPPI

The Appellees, Louis A. Conerly and wife, Gwendolyn R. Conerly, Lyndell R. Rushing and wife, Frances S. Rushing, Merwin D. Wood and wife, Sarah T. Wood, Ronald Mentel and wife, Judith L. Mentel, by their undersigned attorneys, move to dismiss the appeal of Appellant, Mississippi Power & Light Company. In the alternative, Appellees move to affirm the December 12, 1984, decision by the Supreme Court of the State of Mississippi, as provided by Rule 16 of the United States Supreme Court Rules.

I. OBJECT

It is Appellees' contention that Appellant's case does not present a substantial federal question, and its appeal is not within the purview or in conformity with 28 U.S.C. 1257(2), or Rule 10 of the United States Supreme Court Rules.

Appellees respectfully submit that Appellant failed to timely raise, plead, present, argue, or preserve for appeal purposes a federal question of any type in its pleadings or arguments in the Special Court of Eminent

Domain or in the Supreme Court of the State of Mississippi. Thence, neither of the two state courts had before it the alleged federal questions Appellant is raising for the first time on its appeal under the provisions of 28 U.S.C. 1257(2).

It is readily apparent that Appellant never timely challenged the constitutionality of §11-27-15, §11-27-47, and §77-3-67 of the Mississippi Code of 1972, as amended, on the ground that they are repugnant to the Constitution of the United States. On the other hand, the Supreme Court of Mississippi, on November 1, 1978, determined that §11-27-1, et seq, being the eminent domain statutes, were constitutional. See Jackson Redevelopment Authority v King, Inc., Miss. 364 So.2d 1104.

The Appellant relied upon these now challenged statutes as its vehicle and legal authority for filing of Appellant's original suits in the Special Court of Eminent Domain of Walthall County, Mississippi, and also when it appealed this case to the Mississippi Supreme Court.

Now it appears from reading the Jurisdictional Statement and Appendix to Jurisdictional Statement by Appellant that the Appellant has now completely reversed

its original position of having relied upon the eminent domain statutes to condemn Appellees' lands. How can Appellant invoke the Court's aid and protection because of the aforesaid eminent domain sections, and then having lost its case can now contend that the aforesaid sections are repugnant to the Constitution of the United States?

II. NO SUBSTANTIAL FEDERAL QUESTION

This appeal does not present any substantial federal question or questions. The federal questions sought to be reviewed by Appellant were neither timely nor properly raised, nor expressly passed on by the Mississippi Supreme Court. The judgment of the Mississippi State Supreme Court squarely rests upon an adequate nonfederal grounds.

The grounds raised by Appellant for this appeal are frivolous and without merit. The appeal by Appellant requests a review on such general and vague grounds so as to ask this Honorable Court to merely second-guess the Mississippi Supreme Court on the merits of this case. Additionally, there being no good reason in law or facts for this appeal, allowance of Appellant jurisdiction in this case would waste time, effort and expense on an

already overcrowded docket. Furthermore, the Appellant's request for granting of a Writ of Certiorari pursuant to 28 U.S.C. §2103 is also without merit.

III. WHY THIS APPEAL SHOULD BE DISMISSED

The appeal is not within the jurisdiction of this court because it is not taken in conformity with 28 U.S.C. 1257(2) which states,

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. (Emphasis supplied)

Appellant expressly relies on this statute as one of its two bases for this appeal (See Appellant's Jurisdictional Statement pp. 1 and 3). The only statutes mentioned in a text of the State Supreme Court's opinion are §77-3-11, §11-27-2, et seq., §11-27-47, §11-27-15, §77-3-5, §77-3-67, §77-3-47 (M.C.A. 1972) and Article 3, Section 17, Mississippi Constitution 1890.

Nowhere was the validity of these or any other state statutes mentioned in the opinion of the state court, drawn in question, as to being repugnant to the Constitution, treaties, or laws of the United States.

Appellant failed to make a presentation why it is contended there are raised substantial federal questions so as to bring the case into the jurisdiction of this court for plenary consideration, nor cites legal precedents to support such jurisdiction. Supreme Court Rule 10 requires such citations.

For these reasons also, as is apparent from the state court's opinion, the judgment of the state court rests on adequate non-federal bases, namely, as follows:

> "The trial judge clearly found that the petition should be dismissed pursuant to the requirements of MCA §11-27-15 (1972), in that there was no public necessity for the taking of the particular property or part thereof. The property was not being taken for 'public use' and was not 'in law a public use for which private property may be taken or damaged.'"
>
> "Even though Judge Pigott went further and held that MPSC erroneously labeled the line 'intrastate', the opinion still conforms to the requirements of §11-27-15. We agree that MPSC was in error in making the line 'intrastate' but we do not think that this holding was necessary for the disposition of the condemnation proceeding as was done by Judge Pigott. We agree with him that the terms 'public necessity' and 'public use' as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of this state. This is true especially if these citizens rate payers are to pay $23,500,000 for a line and then have that amount added to their future rate base."
>
> "We find no error in the dismissal of the order of the Special Court of Eminent Domain and therefore affirm that court's action."

AFFIRMED.

WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, DAN LEE, PRATHER, ROBERTSON, AND SULLIVAN, JJ., CONCUR. PATTERSON, C.J., NOT PARTICIPATING."

In reading the state court's opinion and Appellant's Jurisdictional Statement, it becomes clear that the reasons cited by Appellant for appeal are not valid ones, and that Appellant is merely pinning its hopes for a technical and arbitrary reversal of an opinion on this court's taking jurisdiction of the case in full.

For the foregoing reasons, the appeal in this case should be dismissed as completely lacking jurisdiction.

IV. CONCLUSION

Appellant has sought to bring an unwarranted appeal, and the appeal should be dismissed for lack of jurisdictional requirements, and because it is not taken in conformity with Statute 28 U.S.C. 1257(2) or within the Supreme Court Rules. Further, that the appeal does not present a substantial federal question, or further, that the federal questions sought to be reviewed by Appellant was not timely or properly raised and was not expressly ruled upon by the Mississippi Supreme Court, and further that the Judgment of the Mississippi Supreme Court rests upon adequate non-federal bases. The contention by

Appellant that this opinion denies Appellant the due process of law in violation of the Fourteenth Amendment, and further that it violates Article I, Section 8, Clause 4 of the Fourteenth Amendment to the Constitution of the United States presents no substantial federal questions. There is a presumption that the state court properly decided this case. Appellees request that this Court take notice of the fact that the Appellant has now reversed its original position in this litigation by now asking this Court to declare the eminent domain statutes of the State of Mississippi repugnant to the Constitution of the United States. This was not and has not been done by the Mississippi Supreme Court in this case. Appellees Motion to Dismiss, or in the Alternative to Affirm in this matter should be sustained. Appellees request this pursuant to Rule 16.1(d) of the rules. Further that all costs should be assessed against Appellant.

IT IS SO MOVED.

Respectfully submitted,

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C E R T I F I C A T E

I, Delos H. Burks, Attorney for Appellees, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Appellees' Motion to Dismiss, or in the Alternative, to Affirm the Decision of the Supreme Court of Mississippi to the Honorable Charles T. Ozier of Wise, Carter, Child & Caraway, Post Office Box 651, Jackson, Mississippi 39205, Attorney for Appellant.

THIS, the 27th day of April, 1985.

Delos H. Burks
By: Anna A. Carroll
DELOS H. BURKS

No. 84-1454

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MISSISSIPPI POWER & LIGHT COMPANY

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LOUIS A. CONERLY, ET ALS

Appellees,

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On Appeal from the Supreme Court of Mississippi

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APPELLEES' BRIEF SUPPORTING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM THE SUPREME COURT OF MISSISSIPPI

—0—

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April 28, 1985

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APPELLEES' BRIEF SUPPORTING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM THE SUPREME COURT OF MISSISSIPPI

The Appellant, Mississippi Power & Light Company, is basing its appeal within the purviews of 28 U.S.C. 1257(2) which reads as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellant makes a further request that its appeal be likewise considered by writ of certiorari as provided by 28 U.S.C. 1257(3), if the appeal is denied.

This litigation arose when Appellant filed four eminent domain suits in Walthall County, Mississippi, against the four Appellees, as part of a 51-mile link in a high-voltage electric transmission line connecting Appellant with its sister company, Louisiana Power & Light Company domiciled in New Orleans, Louisiana.

The statutory authority for condemnation of Appellees' lands

was shown in paragraph number 3 as Section 11-27-47, Mississippi Code of 1972, annotated. This authority granted to electric power companies was enacted in 1922 and has not been modified as to them to date. On this appeal the Appellant utility company seeks to have its eminent domain authority declared unconstitutional on the grounds of being repugnant to the Constitution of the United States. The state code section is included in full as Appendix "A" to this brief.

Appellees respectfully point out that Appellant did not timely challenge in the trial court the constitutionality of 11-27-47 or two other sections of the Mississippi Code, namely, 11-27-15 and 77-3-67, it now declares are likewise constitutionally repugnant. Appellant's petition for rehearing sought to reverse the state court's unanimous opinion of October 10, 1984, attempted to challenge the statutes' constitutionality.

Appellees respectfully submit that the Supreme Court of Mississippi's opinion of October 10, 1984, and modification thereof on December 12, 1984, have accurately and correctly analyzed and interpreted all state statutes Appellant now seeks to have declared unconstitutional. Those opinions being set out in full in Appellant's

Appendix to Jurisdictional Statement. In the case at bar, the final decision by the state court was correctly decided on state law, and there is a presumption that the Court did its full duty in light of all questions timely raised.

Harrison v NAACP, 79 S.Ct. 360 U.S. 167, 3 L.Ed. 1558

Section 17 of the Mississippi Constitution declares that if a landowner challenges the authority of the condemnor to take land for an alleged "public use", that question is to be decided by the Judiciary and not the Legislature. That section is as follows:

> "Section 17. Private property shall not be taken or damaged for public use, except on due compensation being first made to owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public." SOURCES: 1817 art I § 13; 1832 art I § 13; 1869 art I § 10. (Emphasis supplied)

The Mississippi Legislature completely revamped its eminent domain laws when it enacted Chapter 520, Laws of 1971, which took effect on January 1, 1972. One section added is Section 11-27-15 which Appellant now for the first time on appeal challenges its constitutionality.

This section mandated by the state constitution, supra, affords a landowner three separate grounds to challenge the condemnation proceedings in court by filing a motion to dismiss. Appellees here made their individual motions to dismiss pursuant to this statutory authority, namely:

> "(1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged."

The duly elected, qualified and acting Circuit Judge sitting as Judge of the Special Court of Eminent Domain consolidated the four cases and after a full hearing, found for the four landowners and against the Appellant, Mississippi Power & Light Company. That dismissed order appears in full at pages 23a-29a of Appellant's Jurisdictional Statement. The trial court's order dismissing the four eminent domain suits, said in part:

> "It is admitted that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co."

"The primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to the Louisiana Power & Light Co. in the State of Louisiana near Bogalusa, Louisiana, ultimately to be extended by Louisiana Power & Light to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line." (Emphasis supplied)

The trial court and the State Supreme Court found and determined that there was no "public necessity" in Mississippi for the erection of the interstate high-powered electric transmission line.

The State Supreme Court affirmed the trial court's conclusions by an unanimous decision of October 10, 1984, and again on December 12, 1984, in denying Mississippi Power & Light Company's petition for rehearing.

Appellees' respectfully submit that the Appellant lost its cases of factual grounds after having the state laws and state constitution properly applied, and there is no "substantial federal question" upon which its appeal can lie.

Appellant has improperly included in its Jurisdictional Statement a copy of an eminent domain judgment in the case of Mississippi Power & Light Company vs Jewell D. Thomas and Francis W. Thomas, Cause No. 3823, entered August 19, 1983. Appellees' respectfully point

out that this judgment has absolutely nothing to do with Appellees' consolidated cases on appeal, as it is not in the transcript of the trial court and was not before the State Supreme Court on appeal. A copy was included in Appellant's petition for rehearing only. It is elementary law that no appellate court may consider or act upon any documents, exhibits, et cetera, which are not shown by the trial court record. See Shelton v Kindred, Miss. 279 So.2d 642 (1973), in part:

> "(3) The burden rested upon appellant to see to it that the record contained all data essential to an understanding and presentation of matters relied upon for reversal on appeal. Willenbrock v. Brown, 239 So.2d 922 (Miss. 1970).
>
> "(4-6) This Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record. It must be presumed that the rulings of the trial court were correct, and such presumption will prevail, unless the actual record supports the contrary view."

Likewise, in McGowan v. McGowan, Miss. 357 So.2d 946 (1978), at page 950:

> "Finally, this Court cannot consider matters not properly a part of the record. Certain remarks attributed to the chancellor and not made a part of the record come within that category. This fact is not altered by their inclusion in appellant's petition for rehearing filed in the Chancery court after the case had been removed to this Court on appearl."

In St. Louis Fire & Marine Ins. Co. v. Lewis, Miss. 230 So.2d 580 (1970):

> "It is well settled that we will not consider statements of facts contained in briefs of counsel, but that we must confine ourselves to the facts as shown by the record."

Appellees respectfully request that the Thomas judgment be stricken from Appellant's Jurisdictional Statement as being outside the record below and is a desperation effort by Appellant to prejudice Appellees' rights under law.

NO SUBSTANTIAL FEDERAL QUESTION

It is Appellees' contentions that the eminent domain laws, and laws governing the state's public service commission in the State of Mississippi, were correctly interpreted by the State Supreme Court's unanimous opinions of October 10 and December 12, 1984, and no substantial federal questions are before the Supreme Court of the United States. In other words, no federal right was denied Mississippi Power & Light Company in its unsuccessful litigation efforts to condemn Appellees' lands as part of a 51-mile link to connect subsidiary electric power corporation facilities of different states.

To the contrary, Appellees contend that the highest appellate court of Mississippi correctly applied its

constitution and laws appertaining to a sovereign state's power of eminent domain. Moreover, the State Supreme Court's decision makes a prima facie case that it was not based on a federal question as contemplated by 28 U.S.C. 1257 (2). Appellees' further contend that such authority is a grant from the Legislature and may be withdrawn at any time provided all private corporations are accorded the same treatment.

In Stone v. Southern Illinois & Mo. Bridge Co., 206 U.S. 267, 51 L. Ed. 1057, a case dealing with powers of eminent domain, we find:

> "These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the state supreme court.
> "There is no contention that the statutes conferring the right of eminent domain, passed by the legislature of the state of Missouri, and which its courts have decided authorize this appropriation by the defendant in error, do not make ample provisions for assessment of damages to the landowner by due process of law. Whether a given corporation comes within the law of the state and is entitled to assert its power, presents only a question of state law." (Emphasis supplied)

Another case dealing with state statutes on eminent domain and removal to federal court under diversity of citizenship of the parties, was Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 49 L.Ed.462,

Mr. Justice Harlan writing for the majority, said in part:

> "Speaking generally, it is for the state, primarily and exclusively, to declare for what local public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the state may not prescribe any mode of taking private property for a public purpose, and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a circuit court of the United States a condemnation proceeding which, in its essential features, is a suit involving a controversy between citizens of different states." (Emphasis supplied)

Mr. Justice Holmes writing for a dissenting minority, wrote in part:

> "It is said, however, that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the state to determine. "There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American juris-prudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments." (Emphasis supplied)

In Louisiana Power & Light Company v. City of Thibodaux, 360 U.S. 25, 3L Ed 2d 1058, 79 S. Ct. 1070 (1959), Mr. Justice Frankfurter's majority opinion

emphasized that state courts are the proper tribunel to interpret and apply state eminent domain statutes. In part, he wrote at headnotes 3-7, as follows:

> "Although an eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law,' Kohl v United States, 91 US 367, 375, 376, 23 L ed 449, 452, it is of a special and peculiar nature. Mr. Justice Holmes set forth one differentiating characteristic of eminent domain: it is intimately involved with sovereign prerogative. And when, as here, a city's power to condemn is challenged, a further aspect of sovereignty is introduced. A determination of the nature and extent of delegation of the power of eminent domain concerns the apportionment of governmental powers between City and State. The issues normally turn on legislation with much local variation interpreted in local settings. The considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court.
>
> (360 US29)
>
> "The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitely--the courts of the State under whose statute eminent domain is sought to be exercised--rather than himself make a dubious and tentative forecast. This course does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition. Eventually the District Court will award compensation if the taking is sustained. If for some

> reason a declaratory judgment is not promptly sought from the state courts and obtained within a reasonable time, the District Court, having retained complete control of the litigation, will doubtless assert it to decide also the question of the meaning of the state statute. The justification for this power, to be exercised within the indicated limits, lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." (Emphasis supplied)

Appellees respectfully submit that the Appellant's attempted appeal under 28 U.S.C. 1257(2) or 1257(3) failed to note its failure to timely raise the alleged federal questions in the state courts below. Appellant's brief claims a denial of 14th Amendment rights. However, Pierre v. State of Louisiana, 59 S.Ct. 536, 306 U.S. 354, 83 L. Ed. 757 (1939) clearly holds that such alleged denial had to be timely raised and subject to revision by the State Supreme Court. Appellant cites as its authority to raise a constitutional question in its petition for rehearing, the 1932 case of Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct 145, 287 U.S. 358, 77 L.Ed. 360. It is respectfully submitted that Appellant's case is inconsistent with Cardinale v. Louisiana, infra, a 1969 decision, and legions of other cases since 1932.

Appellant has challenged the constitutionality of Section 11-27-15, Mississippi Code of 1972 enacted in 1971, which among other things provide three specific grounds for a landowner to challenge in court the condemning authority's eminent domain proceedings.

This Court may be interested in the different versions of eminent domain provisions in the Mississippi Constitutions of 1817, 1832, 1869, and the current 1890 version. All four contain the words "public use". The first version required the consent of "his representatives". The second version required the consent of "the Legislature". The third or 1869 version provided that condemnation of land for public use permitted it to be done "in a manner to be provided by law".

It should be noted that the 1890 and present Section 17 of the Mississippi Constitution on eminent domain, specifically declared for the first time that if the alleged "public use" was questioned by the landowner, that would be a "judicial question".

The 1971 recodification of Mississippi's eminent domain laws added a third legal remedy or cause to challenge such a condemnation suit. This third ground tracks the requirements of Section 17 of the Mississippi Constitution.

The 1971 Legislature didn't require the landowner to challenge an eminent domain proceeding before the Public Service Commission, State Building Commission, municipalities, Board of Supervisors, Pat Harrison Waterway District, or before other entities granted the power of eminent domain.

The 1971 dismissal section, 11-27-15, clearly provides for making a motion to dismiss directly in the Special Court presided over by a County Judge or a Circuit Judge (in a county with no County court). The Legislature recognized two things, first, Section 17 of the State Constitution required a questioned "public use" to be decided as a "judicial question", not a Legislative, Executive, or Public Service Corporation question.

The 1971 Legislature knew that only a court of law, i.e., an elected trial judge, had the authority to decide a judicial question without a jury. It is elementary law that a "judicial" question proper for the determination by a court of justice, as distinguished from "legislative" question or "political" question in the executive branch of government.

For Mississippi Power & Light Company to argue that a Circuit Judge presiding over a Special Court of Eminent Domain, as in the case at bar, is powerless to

consider and decide a collateral attack under the authority of Section 11-27-15, is to completely ignore the 1971 revised eminent domain act.

The trial court found and determined that the 51-mile link of 500kv line was a part of an interstate line and that it will serve no Mississippi customer of Mississippi Power & Light Company; the construction of the line leading to New Orleans, Louisiana, is solely for interstate business and the sales are an interstate commerce. The court concluded that the Mississippi Public Service Commission had exceeded its statutory authority and jurisdiction in awarding a Certificate of Public Convenience to construct the link of transmission line, and that the four eminent domain cases should be dismissed.

U.S. Supreme Court Rule 71A(k) even requires federal eminent domain proceeding as well as diversity of citizenship suits in U.S. District Courts, to be tried pursuant to the laws of the states. On the third page of Subdivision (k) (page 71A 597) we find:

> (3) Condemnation Under a State's Power of Eminent Domain. Subdivision (k) provides:
> "The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state makes provisions for trial of any issue by jury, or for trial of

the issue of compensation by jury or commission or both, that provision shall be followed."

"Rule 71A came into existence primarily to provide a modern and simple procedure, in lieu of conformity to state practice, for actions involving the federal power of eminent domain, most of which are brought by the United States.[1] A few condemnation actions involving the exercise of state power do, however, reach the federal court usually on the basis of diversity.[2] The purpose of subdivision (k) is to make the practice of Rule 71A applicable to these actions, except as to mode of trial. Here there is to be conformity to state law."

Traditionally, the United States Supreme Court have denied appeals from the decision of a state's highest appellate court, and those granted involved diversity of citizenship cases appear to have decided that the state statutes granting eminent domain authority should prevail. The only exception being that a state's statute denied a litigant due process of law under the 14th Amendment.

Another cardinal legal issue on this appeal is that the Supreme Court will not decide federal constitutional issues raised for the first time on a review of state court decisions. See Cardinale V. Louisiana, 89 S. Ct. 1162, 394 U.S. 437, 22 L. Ed. 2d 398 (1969).

In the case at bar, Mississippi Power & Light Company never raised a constitutional issue or a federal

question in the trial court or state supreme court until it filed a petition for rehearing following an October 10, 1984, unanimous decision adverse to the company who was Appellant there and here.

Appellant also challenges the constitutionality of a Mississippi Public Service Commission statute, namely, Section 77-3-67, Mississippi Code of 1972. This statute, among other things, provides that any party aggrieved by an order or decision of the state public service commission, could effect an appeal within 30 days to the Chancery Court. This appeal provision was enacted in 1956 and reenacted in 1978. Appellant contends that the four landowners (all residents of Louisiana) failed to appeal within 30 days of the commission's 1981 order granting a Certificate of Public Convenience and Necessity to construct the 51-mile line of an interstate electric transmission line. Appellant argued below that Appellees failed to appeal from the Public Service Commission order and, thence, were not entitled to collaterally attack that certificate order before the trial court as the 1971 Legislature clearly said could be done. The State Supreme Court concluded that the four landowners could not appeal from an order of which

they had no due process notice or other notice of a Public Service Commission proceeding. Mr. Justice Bowling, writing for an unanimous State Supreme Court, said in part:

> "Admittedly, appellee landowners in Walthall County received no notice of the 'hearing' before the MPSC, had no actual notice and therefore certainly would not know to appeal any such order within thirty days to the Chancery Court of Hinds County. It does not take a constitutional scholar to find that the requiring of these appellees to appeal an order affecting them and about which they had absolutely no notice or knowledge, is contrary to the due process requirements of either the state or federal constitutions. See Schroeder v. New York, 371 U.S. 280, 9 L. Ed. 2d 255, 83 S. Ct. 279, (1962); and Walker v. Hutchinson, 352 U.S. 112, 1 L. Ed 2d 178, 77 S. Ct. 200 (1956)."

In effect, Appellant would deny Appellees the constitutional rights of due process of law, by requiring them to appeal from a state agency ex parte proceeding order, without any notice whatsoever to them as freeholders whose lands were in the path of an interstate power line. Moreover, Appellants would deny these landowners their right given them by the 1971 Legislature to collaterally attack such order in an eminent domain suit relying upon such order and to challenge the "public use" as a "judicial question" by an elected Circuit Court Judge.

There is no merit to Appellant's claim of a federal question or substantial federal question, but is merely a "smokescreen" to circumvent an adverse decision by the Supreme Court of the State of Mississippi. The validity of every eminent domain statute survived a constitutional challenge in the case of Jackson Redevelopment Authority v. King, Inc., Miss. 364 So. 2d. 1104 (1978). See headnote 8, 9 and 10.

CONCLUSION

The case of Appellant Mississippi Power & Light Company versus Appellees Louis A. Conerly and wife, Gwendolyn R. Conerly; Lyndell R. Rushing and wife, Frances S. Rushing; Merwin D. Wood and wife, Sarah T. Wood; and Ronald Mentel and wife, Judith L. Mentel, should be dismissed, or alternatively, the decision of the Mississippi Supreme Court should be affirmed.

Respectfully submitted,

APPELLEES:

Louis A. Conerly and Gwendolyn R. Conerly
Lyndell R. Rushing and Frances S. Rushing
Merwin D. Wood and Sarah T. Wood
Ronald Mentel and Judith Mentel

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By: Nora A. Carroll

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Attorneys for Appellees

CERTIFICATE

I, Delos H. Burks, Attorney for Appellees, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Appellees' Brief Supporting Motion to Dismiss, or in the Alternative, Motion to Affirm the Supreme Court of Mississippi to the Honorable Charles T. Ozier of Wise, Carter, Child & Caraway, Post Office Box 651, Jackson, Mississippi 39205, Attorney for Appellant.

THIS, the 27th day of April, 1985.

Delos H. Burks
By: anna a. Carroll
DELOS H. BURKS

§ 11-27-45. Power lines across railroads.

All companies, or associations of persons incorporated or organized for the purposes set forth in section 11-27-41 may acquire a right-of-way across railroads by condemnation by the exercise of such right of eminent domain. If a right-of-way across a railroad has been condemned by a hydroelectric company, as herein defined, the railroad company shall be advised of the manner in which said hydroelectric company proposes to erect its poles and string its wires and conductors, and if the railroad company shall object thereto, the public service commission shall have jurisdiction upon complaint filed with it by the railroad company to enter an order directing how the poles, wires and conductors shall be constructed, and the railroad shall be crossed as ordered and in no other manner.

SOURCES: Codes, 1942, § 2749-23; Laws, 1971, ch. 520, § 23, eff from and after January 1, 1972.

§ 11-27-47. Pipelines.

All companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the State of Mississippi, or natural gas districts, incorporated or organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances, for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipelines and appliances along or across highways, waters, railroads, canals, and public lands, above or below ground, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals, and public lands. The board of supervisors of any county through which any such line may pass shall have the power to regulate, within its respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county. All such companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof.

EXHIBIT "A"